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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BILLY WAYNE CIGGS, JR., Defendant and Appellant.	E070212 (Super.Ct.No. RIF110879) OPINION

APPEAL from the Superior Court of Riverside County. David A. Gunn, Judge. Affirmed in part; reversed in part with directions.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

This is the third appeal brought by defendant Billy Wayne Ciggs, Jr., following his convictions for one count of shooting at an occupied motor vehicle and four counts of assault with a firearm. In the first appeal, we affirmed the judgment in its entirely. (*People v. Ciggs* (July 12, 2005, E036083) [nonpub. opn.] (*Ciggs I*).)

A federal court subsequently granted defendant's petition for writ of habeas corpus and directed the trial court to resentence defendant on count 2. Defendant appealed from his new sentence and, in the second appeal, this court reversed the judgment in part because the sentences on counts 2 through 5 each incorrectly included an enhancement for the personal use of a firearm during the commission of a felony (Pen. Code, former § 12022.5, subd. (a)(1)) and an enhancement for the use of a firearm during the commission of a violent felony (Pen. Code, § 188.66, subd. (b)(1)(C)). (*People v. Ciggs* (Feb. 21, 2017, E064606) [nonpub. opn.] (*Ciggs II*).)

Almost one year after we issued the remittitur in the second appeal, the trial court resentenced defendant. Defendant once again appeals, contending the trial court erred by imposing a full 10-year gang enhancement on count 3 (a subordinate count), instead of one-third the enhancement as mandated by Penal Code section 1170.1, subdivision (a). Defendant also argues the judge who resentenced him acknowledged on the record that he was not familiar with the facts and circumstances of the case and, therefore, the judge did not exercise informed, independent judgment when imposing sentence. Finally, defendant asks that we remand for the trial court to consider whether to strike the enhancements for personal use of a firearm under authority granted to the trial court by

an amendment to Penal Code section 12022.5, which went into effect while defendant was waiting to be resentenced.

The People concede that the trial court erred by imposing a full 10-year gang enhancement on count 3 and request that we correct the sentence. However, the People argue the resentencing judge did exercise his informed discretion when resentencing defendant and denying his request to strike the firearm use enhancements, and the People oppose a remand for resentencing.

We agree with the parties that the trial court erred by imposing a full 10-year gang enhancement on count 3. In addition, although the resentencing judge stated on the record that he understood he had independent discretion to resentence defendant as he saw fit, the judge also stated he was not familiar with the facts and circumstances of the case and that he would defer to the sentence imposed by the original sentencing judge who was familiar with those facts. Because the record strongly suggests the court did not truly exercise informed, independent discretion, we reverse the sentence and remand for resentencing. On remand, the trial court shall decide in the first instance whether to exercise its discretion to strike one or more firearm use enhancement.

We reverse the sentence on counts 2 through 5 and remand for the trial court to resentence defendant within 120 days of the issuance of the remittitur in this case.

I

PROCEDURAL BACKGROUND[1]

In May 2003, defendant and other members of the Young International Paper Chasers gang tried to crash a party in Moreno Valley. The men started a fight and, when some attendees of the party tried to drive away, defendant shot at their car and struck it three times. Luckily, none of the car's occupants were hit. (*Ciggs I*, *supra*, E036083.)

In 2004, a jury found defendant guilty of one count of shooting at an occupied motor vehicle (Pen. Code,[2] § 246, count 1) and four counts of assault with a firearm (§ 245, subd. (a)(2), counts 2-5). With respect to all five counts, the jury rendered true findings that defendant committed his crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)), and with respect to counts 2 through 5, the jury rendered true findings that defendant personally used a firearm during the commission of a felony (former § 12022.5, subd. (a)(1)). The trial court sentenced defendant to state prison for an indeterminate term of 15 years to life on count 1 (see § 186.22, subd. (b)(4)(B)), plus a determinate term of 29 years eight months on counts 2 through 5. On count 2, the court sentenced defendant to the aggravated term of four years. (*Ciggs I*, *supra*, E036083.) The sentences on counts 2 through 5 each included an enhancement for the personal use

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[1] On our motion, we take judicial notice of the following documents from the superior court's case file, which were not included in the record on appeal: (1) the April 26, 2017, file-stamped copy of the remittitur in *Ciggs II*; (2) a September 14, 2017 request for continuance; and (3) an October 24, 2017 request for continuance. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

[2] All additional unspecified statutory references are to the Penal Code.

of a firearm during the commission of a felony (former § 12022.5, subd. (a)(1)) *and* an enhancement for the use of a firearm during the commission of a violent felony (§ 188.66, subd. (b)(1)(C)). (See *Ciggs II*, *supra*, E064606.)

In an unpublished opinion affirming the judgment, this court rejected, inter alia, defendant's claim that the trial court violated the Sixth Amendment to the United States Constitution by imposing an upper term sentence on count 2 based on facts not found true by a jury beyond a reasonable doubt. (*Ciggs I*, *supra*, E036083.) The California Supreme Court denied review. (*People v. Ciggs* (Oct. 12, 2005, S136624) review den.)

In October 2006, defendant filed a petition for writ of habeas corpus in the United States District Court for the Central District of California addressing, inter alia, the Sixth Amendment claim in regard to the sentence on count 2. (See *Ciggs v. Felker* (C.D. Cal., April 28, 2010, No. EDCV 06-1133 SVW(JC)) 2010 U.S.Dist. Lexis 83424, *1-*2.) Some four years later, the district court granted defendant's petition in part, concluded the trial court violated the Sixth Amendment as interpreted in *Cunningham v. California* (2007) 549 U.S. 270 when it imposed an upper term of four years on count 2, and issued a writ of habeas corpus directing the trial court to resentence defendant on count 2. (*Ciggs v. Felker* (C.D. Cal., Aug. 10, 2010, No. EDCV 06-1133 SVW (JC)) 2010 U.S.Dist. Lexis 83420.)

Neither the district attorney nor the superior court received notice of the federal court's order until five years later, when defendant filed a petition for recall of his sentence and resentencing. The superior court, after considering the factors set forth in the California Rules of Court, resentenced defendant to the same upper term of four years

on count 2. In the second appeal, defendant argued, and the People conceded, that the trial court erred by imposing sentence enhancements on counts 2 through 5 under former section 12022.5, subdivision (a)(1), *and* section 186.22, subdivision (b)(1)(C), for the use of a firearm arising from a single offense, to wit, assault with a firearm. We reversed the sentence on counts 2 through 5, remanded the case for resentencing, and affirmed the judgment in all other respects. (*Ciggs II*, *supra*, E064606.)

We issued our remittitur in *Ciggs II* on April 26, 2017, and the superior court received it the same day.

The superior court did not act on the remittitur until it received a letter from defendant on June 7, 2017, inquiring about the status of his appeal. Two days later, the court appointed the public defender to represent defendant, and the district attorney and public defender stipulated to continue the resentencing hearing. The court found good cause to continue the hearing until June 22, 2017.

On June 22, 2017, the district attorney and public defender again stipulated to a continuance. The trial court found good cause to continue the resentencing to July 13, 2017.

On July 13, 2017, the district attorney filed a sentencing brief. The brief set forth the underlying facts of the case, asked the trial court to "give deference to the [judge] who heard this trial and was well aware of the facts," and recommended the court again sentence defendant to 15 years to life plus 29 years four months. The district attorney and public defender appeared and again stipulated to continue the resentencing hearing. The trial court found good cause to continue the hearing until August 24, 2017.

On August 17, 2017, the district attorney and public defender appeared and stipulated to continue the August 24, 2017 resentencing hearing. The trial court again found good cause to continue the hearing, and the minutes state the court set the resentencing hearing for September 7, 2017.

The record contains no minutes to indicate that any hearing took place on September 7, 2017. A week later, on September 14, 2017, one of the parties, presumably the public defender, submitted a form request for continuance which stated, "new counsel appointed." The district attorney and public defender once more stipulated to continue the resentencing hearing. The trial court once more found good cause to continue the resentencing to October 24, 2017.

On October 24, 2017, one of the parties, presumably the district attorney, submitted a form request for continuance, which stated, "DDA in trial—unavailable." The district attorney and public defender again stipulated to a continuance. The trial court again found good cause to continue the resentencing hearing, this time to November 16, 2017.

On November 16, 2017, the district attorney and public defender once more stipulated to continue the resentencing. The trial court once again found good cause to continue the hearing to January 10, 2018.

On December 6, 2017, the superior court received a letter from defendant requesting that he be present for his resentencing. The same day, the trial court filed an ex parte order indicating no further action would be taken on defendant's request because the "Public Defender is having defendant transported."

On January 10, 2018, the trial court, apparently on its own motion, found good cause to continue the resentencing hearing one last time to February 9, 2018. The court directed the public defender to submit a transportation order for the court's signature.

On January 16, 2018, the public defender submitted a transportation order, which the trial court signed the same day.

The trial court finally proceeded with the resentencing hearing on February 9, 2018. Defendant's attorney asked the trial court to reject the prosecutor's request that the court give deference to the original sentencing judge and, instead, argued the court should "exercise its independent judgment" to sentence defendant according to the facts and circumstances of the case. Counsel specifically asked that the court strike the firearm enhancements.

The resentencing judge acknowledged he had "the discretion to resentence in any manner that is consistent with the law." Nonetheless, the judge stated he did not have the benefit of the trial transcripts because neither party had provided them. "I don't have the facts and circumstances that took place." The judge noted that, whereas the original sentencing judge "heard the facts and circumstances, . . . I don't have the benefit of being able to review [the transcripts] at this point." Moreover, the judge noted that, even if he had the transcripts, he would be reviewing "a cold record." Therefore, the judge indicated he would be deferential to the sentence imposed by the original sentencing judge, while "recogniz[ing] I have sole discretion to sentence in any manner that I see fit." The trial court resentenced defendant to 15 years to life plus 29 years four months as follows:

On count 1, the court sentenced defendant to an indeterminate term of 15 years to life in state prison.

On count 2, the court sentenced defendant to the determinate upper term of four years in state prison to be served consecutively to the indeterminate term on count 1. In choosing the aggravated term, the court noted: "I believe the Court previously stated its reasons for the upper term and why that upper term was appropriate. The crime involved great violence, and there are other factors the Court considered." The court also imposed a 10-year enhancement for personal use of a firearm on count 2 and imposed a 10-year gang enhancement but stayed its execution, for a total term on count 2 of 14 years in state prison.

The court sentenced defendant to one-third the middle term of three years on count 3 to be served consecutively to the term imposed on count 2, imposed the middle term of four years for the firearm use enhancement but stayed its execution, and imposed a full 10-year gang enhancement, for a total term on count 3 of 11 years in state prison.

On count 4, the court sentenced defendant to one-third the middle term of three years to be served consecutively to the sentence on count 2. The court imposed the middle term of four years for the firearm use enhancement but stayed its execution, and imposed one-third of the 10-year gang enhancement, for a total term on count 4 of four years four months.[3]

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[3] The minutes and abstract of judgment contradict the reporter's transcript and state the trial court sentenced defendant on count 4 to one-third the middle term of three years for the gang enhancement. The oral pronouncement of sentence usually prevails

Finally, on count 5 the court sentenced defendant to the middle term of three years but stayed its execution.[4] The court imposed the middle term of four years for the use enhancement and one-third of the gang enhancement but stayed execution of both enhancements.

Defendant timely appealed.

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over the minutes and abstract of judgment (*People v. Price* (2004) 120 Cal.App.4th 224, 242), unless the circumstances clearly indicate that the minutes and/or abstract of judgment more accurately reflect the trial court's intended statement of the sentence. (See *People v. Smith* (1983) 33 Cal.3d 596, 599.)

Because the People pleaded and the jury found true that defendant used a firearm during the commission of an assault with a firearm, as defined in section 12022.5 (*Ciggs I*, *supra*, E036083), defendant was subject to the 10-year enhancement under section 186.22, subdivision (b)(1)(C), and not subject to the triad enhancement of two, three, or four years under section 186.22, subdivision (b)(1)(A). (See § 667.5, subd. (c)(8).) Therefore, in this instance, the minutes and abstract of judgment must give way to the oral pronouncement of sentence.

This confusion may have arisen because the trial court inaccurately stated on the record that it was imposing "the midterm" sentence of four years four months for the gang enhancement. In any event, as indicated, *post*, we reverse and remand for resentencing. We assume that on remand the clerk of the superior court will accurately enter the new sentence into the minutes and prepare an amended abstract of judgment that accurately reflects the oral pronouncement of sentence.

[4] Again, in contrast to the reporter's transcript, the minutes and abstract of judgment indicate the trial court sentenced defendant on count 5 to the low term of two years but stayed execution of sentence. The reporter's transcript would appear to reflect the trial court's intended sentence because it follows the prosecutor's recommendation in the sentencing brief. Because we reverse and remand for resentencing, we need not determine which portion of the record should prevail. (See, *ante*, fn. 3.)

II

DISCUSSION

The People concede, and we agree, that the trial court erred by sentencing defendant to a full 10-year gang enhancement on count 3. The sentences imposed on counts 2 through 5 were governed by the determinate sentencing law.[5] (§ 1170 et seq.) "[T]he aggregate term of imprisonment . . . shall be the sum of the principal term [and] the subordinate term . . . . The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include *one-third of the term imposed for any specific enhancements* applicable to those subordinate offenses." (§ 1170.1, subd. (a)(1), italics added.)

Because the term of imprisonment imposed on count 3 was subordinate to the term imposed on count 2, defendant is correct that the trial court was required to sentence him to one-third of the 10-year gang enhancement (3 years 4 months) and not the full 10-year

[5] In its brief, the People state the principle term/subordinate term sentencing methodology from section 1170.1 applies to sentencing under the three strikes law when the defendant is also sentenced to determinate terms. That is true (*People v. Nguyen* (1999) 21 Cal.4th 197, 203-204), but it is irrelevant to this case because defendant was *not* sentenced under the three strikes law. As indicated, *ante*, defendant was sentenced to the indeterminate term of 15 years to life on count 1 because the People pleaded, and the jury found true, that he committed the felony of shooting at an occupied motor vehicle for the benefit of a criminal street gang. (§§ 246, 186.22, subd. (b)(4)(B); see *People v. Brookfield* (2009) 47 Cal.4th 583, 589.)

term. (§ 1170.1, subd. (a)(1).) If that were the sole sentencing error, we would merely correct the sentence ourselves rather than reverse and remand for resentencing. (See *People v. Wilson* (2013) 219 Cal.App.4th 500, 518 [reviewing court may correct unauthorized sentence].) However, the record supports defendant's contention that the resentencing judge gave undue deference to the original sentencing judge and did not exercise his own informed and independent discretion.

As defendant contends, he was entitled to a resentencing based on "'the exercise of the "informed discretion" [by] the sentencing court . . . .'" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) "'It is well established in the law that the severity of the sentence and the placing of defendant on probation rests in the sound discretion of the trial court. [Citation.] It also is fundamental that the law contemplates an exercise of that discretion by the sentencing judge and in the absence of such exercise there has been no lawfully imposed sentence.' [Citation.]" (*People v. Hernandez* (1984) 160 Cal.App.3d 725, 749.)

Although the resentencing judge stated on the record that he understood he had independent discretion to sentence defendant "consistent with the law" and "in any manner that I see fit," it is not entirely clear that the court did, in fact, exercise independent discretion. The prosecutor had specifically asked the court to defer to the original sentencing judge because that judge had been familiar with the facts of the case. The resentencing judge seems to have heeded that advice, stating: "I don't have the facts and circumstances that took place"; whereas the original sentencing judge "heard the facts and circumstances, . . . I don't have the benefit of being able to review [the

transcripts] at this point"; and, even if the judge had those transcripts, he would only be reviewing "a cold record." Ultimately, the judge said, "I am going to be deferential to what the trial court sentenced originally." And when choosing the aggravated term on count 2, the judge seems to have relied on the original sentencing judge's "reasons for the upper term and why that upper term was appropriate." We therefore reverse the sentence on counts 2 through 5 and remand for the court to resentence defendant after having exercised its own independent and informed discretion.

Defendant contends he is also entitled on remand to consideration of the newly authorized discretion to strike firearm use enhancements. Effective January 1, 2018, section 12022.5 was amended to provide: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.5, subd. (c), added by Sen. Bill No. 620 (2017-2018 Reg. Sess.), Stats. 2017, ch. 682, § 1.) We express no opinion on whether defendant is a suitable candidate for relief under the amended statute and, on remand, the trial court shall independently consider whether to exercise its discretion to strike one or more of the firearm use enhancements.

Finally, we wish to comment on the procedural history of this case following our remand for resentencing. We issued our remittitur in the second appeal on April 26, 2017, and the superior court received it the same day. Yet the superior court did not act on the remittitur until after receiving a letter from defendant on June 7, 2017. The trial

court did not resentence defendant until February 9, 2018. In the eight-month gap between receiving defendant's letter and conducting the resentencing hearing, the trial court granted seven stipulated continuances and continued the hearing once on its own motion.

The Legislature has declared that excessive continuances are a major contributor to chronic court congestion, and that it is the duty of the courts, the prosecution, and defense counsel to expedite criminal proceedings to the greatest extent consistent with the ends of justice. (§ 1050, subd. (a).) A party seeking a continuance must file a written motion supported by an affidavit or declaration "detailing specific facts showing that a continuance is necessary." (*Id.*, subd. (b).) The court may grant an oral request for a continuance, but only after conducting a hearing and determining that good cause existed for the moving party to not file a written motion. (*Id.*, subds. (c), (d).) The court must state on the record the facts that establish good cause for not filing a written motion, and if the court finds good cause does not exist to dispense with the requirements of a written motion, the court may impose monetary sanctions as provided in section 1050.5. (*Id.*, subd. (c).) The trial court may grant a continuance only if it finds good cause to do so, and "[n]either the convenience of the parties nor a stipulation of the parties is in and of itself good cause." (*Id.*, subd. (e).) If the court finds good cause and grants the continuance, it must state on the record the facts that support the continuance and support the length of the continuance. (*Id.*, subds. (f), (i).)

Of the seven stipulated requests for continuance that the trial court granted following issuance of our remittitur, only two were made by written motion. There is no indication in the record that the trial court ever conducted a hearing or inquiry into whether good cause existed to permit oral motions to continue, and the minutes are silent as to the facts that supported dispensing with a written motion. Likewise, other than the bare statement that the court found good cause, the minutes are silent as to the *facts* that supported a finding of good cause to continue the sentencing hearing eight times. The two written requests for a continuance stated grounds that clearly supported a finding of good cause (appointment of a new public defender and the prosecutor being in trial), but on this record we cannot determine if good cause had actually been shown for the other six continuances.

Trial courts have broad discretion to grant continuances (*People v. Clark* (2016) 63 Cal.4th 522, 551), and the requirements of section 1050 are directory and not mandatory. (§1050, subd. (*l*).) Nonetheless, we respectfully advise the trial court to act expeditiously on the remittiturs from this court and to not grant pro forma requests for continuances of resentencing hearings. As well, we respectfully remind all counsel of their concomitant duty to act to avoid unnecessary continuance requests.

III

DISPOSITION

The sentence is reversed as to counts 2 through 5, and the matter is remanded for resentencing within 120 days of the issuance of the remittitur. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.